DAC8: Industry Position Paper

The following are our preliminary comments regarding the European Commission's proposal for the 8th amendment to the Directive of Administrative Cooperation ('DAC8').[1] We would be delighted to further elaborate on the various aspects of the proposal, as appropriate.

1) Introductory Remarks

Overall, we acknowledge that in the field of crypto-assets there is a need for increased tax information transparency. We thus welcome the Commission's decision to extend the scope of the existing DAC regime to also cover the exchange of information on crypto-assets. Regulating the legislative field of crypto tax reporting by means of a Directive will, at least to some extent, reduce fragmentation across EU Member States as well as curb the increase in costs and the compliance burden for Crypto Asset Service Providers ('CASPs').

Also, we strongly support the Commission's efforts to ensure consistency between OECD and EU rules in order to increase the effectiveness of information exchange while reducing administrative burdens. A Directive in line with the OECD's Crypto Asset Reporting Framework ('CARF') is another milestone towards the desired regulation of the industry, promoting its sustained growth and adoption.

Ultimately, we acknowledge the principle that crypto tax reporting should no longer be the sole responsibility of individuals, but should also be dealt with, or at least supplemented by, CASPs. Yet this industry is still in its infancy and the dynamics of the market lead to a rapidly changing landscape, both technically and legally. This presents a rather challenging situation for CASPs, who should therefore not be burdened with excessive or practically unimplementable reporting requirements. Altogether, we stress that CASPs, or more generally crypto service providers and operators, should not be treated more adversely or be subject to a greater compliance burden than similarly situated financial service providers.

2) Main Comments

Overall, we want to highlight the following points of concern (not ranked in any specific order):

a. while CASPs will be required to assess and classify reportable crypto-assets on a case-by-case kind basis, the proposal does not provide clear guidance in this regard;

b. the inclusion of staking and lending as 'Crypto-Asset Services' and the related impact on the scope of the term 'Crypto-Asset Operator' ('CAO') is not only alien to CARF, but also goes beyond what has been agreed under the EU-Regulation on Markets in Crypto-Assets

[1] For an overview, see already: Bernt (2022), DAC8: Overview & Commentary, Blockpit Working Paper Series: 001, Linz, Austria, available at: https://blockpit.io/wp-content/uploads/2022/12/DAC8_Commentary.pdf.

(‘MiCA’), leading to an incoherent expansion of the scope of the regulatory perimeter and thus potentially disadvantaging the EU single market (‘gold plating’);

c. the freezing of accounts deemed to be non-compliant is not a requirement in CARF and goes beyond the requirements that apply to traditional financial institutions, thus thwarting the principle of equal treatment (i.e. ‘horizontal equity’);

d. the practical implementation needs to respect data privacy and be guided by industry best practices in terms of sufficient data security and data protection;

e. while the system of a standardized TIN would greatly facilitate the implementation of the DAC8, its timely introduction seems very ambitious from today's perspective;

f. recognizing the significant implementation challenges facing CASPs, we would support the introduction of an interim penalty abatement regime;

g. despite the rather short implementation period, the proposal does not contain any concrete standards on the exact implementation of the reporting standards (in particular, there is a lack of provisions that ensure a minimum degree of the transmitted data quality).

a. Classification of Reportable Crypto-Assets

In the proposal a ‘Reportable Crypto-Asset’ is defined as any crypto-asset other than a Central Bank Digital Currency (‘CBDC’), e-money, e-money token, or any crypto-asset which a Reportable Crypto Asset Service Provider (‘RCASP’) “adequately determines” cannot be used for payment or investment purposes. In this regard, Recital 14 of the proposal calls on RCASPs to consider on a case-by-case basis whether crypto-assets can be used for payment or investment purposes, taking into account the exemptions provided for under MiCA, in particular in relation to limited networks and certain utility tokens.

According to the Commission’s Impact Assessment Report, we can only assume that the above exemptions apply to, on the one hand, ‘utility tokens’ which are solely accepted by the issuer of such tokens and are issued with non-financial purposes to digitally provide access to applications, services or resources available on blockchains (so-called ‘closed-loop systems’, e.g. certain vouchers, airline miles, etc.), and, on the other hand, so-called ‘non-marketable crypto-assets’ which are not traded in a publicly available market or do not require intervention by a CASP (e.g. trading card games). This, of course, is rather vague and makes it difficult, if not impossible, to ‘adequately determine’ which crypto-assets fall under the scope of DAC8. In order to avoid a significant lack of consistency in application of the rules, we urge the need for more clarity.

However, while calling for more clarity on the scope of DAC8, we still want to highlight the need for alignment with the consensus reached under MiCA in line with MiFID II for security tokens. This not only makes sense for reasons of simplicity and coherence of the reporting standards, but is also necessary to create a uniform legal framework within the EU. Hence, crypto-assets that do not fall within the scope of MiCA should also not be covered by DAC8. In this regard, we propose

to include in DAC8, and respectively its Annexes, that when assessing whether crypto assets should be considered reportable RCASPs should take into account whether or not such assets fall under MiCA. In most cases, this could prevent duplicative review obligations, as most RCASPs are already required to assess reportability under MiCA anyway. Furthermore, this could streamline the approach towards non-fungible tokens (‘NFTs’), privacy coins and the like, and make separate explanations in DAC8 redundant.

Apart from the lack of clarity of the current proposal, from a practical point of view, we argue that the rule that RCASPs have to consider on a case-by-case basis whether crypto-assets can be used for payment or investment purposes might turn out to be rather inappropriate, even with the help of the above recommendations. In fact, we believe that this might lead RCASPs to either treat what are actually the same crypto-assets differently or to classify each and every asset as reportable in order to avoid potential liability and inconsistency with other RCASPs. Not only would the latter unnecessarily inflate the information received by national competent authorities (‘NCAs’), but it could also result in a non-coherent collection of information that could compromise not only the efficiency but also the effectiveness of the whole reporting regime. Therefore, we wish for clearer guidelines that allow for a coherent and uniform interpretation and do not make this decision solely dependent on the RCASP and wherever appropriate, minimise the circumstances where case-by-case evaluation would need to be applied.

Therefore, we advocate for clear information on the classification of reportable crypto-assets, namely those used for payment or investment purposes. Further, we recommend that DAC8 adopts a definition of crypto assets which is consistent with the definition used in MiCA and MiFID II.

b. Significant Inconsistencies with MiCA and CARF

In general, we acknowledge the significant fiscal importance of staking and lending and therefore support that these transaction types should also be recorded and reported accordingly. However, the inclusion of both in DAC8 as so-called ‘Crypto-Asset Services’ is not only alien to CARF, but also goes beyond what has been agreed under MiCA. It is well known that there were several discussions on whether these two services should be included in both instruments, but the legislators clearly decided against this for various reasons. We believe that the current proposal to include staking and lending could lead to an undesired, incoherent extension of the scope of the regulatory perimeter and thus also to a potential disadvantage of the EU single market (‘gold plating’), especially considering the implications in relation to the scope of ‘Crypto-Asset Operators’ (‘CAOs’), as discussed f below. Therefore, we strongly suggest not including staking and lending as Crypto-Asset Services under DAC8, but only in the context of transaction reporting.

Whereas a principal agreement reached under MiCA is the definition of a CASP, DAC8 would now also cover CAOs, thus targeting (i) entities providing crypto-asset services not regulated under MiCA (e.g., services relating to NFTs, as well as staking and lending), and (ii) companies which are not MiCA-licensed and are serving EU customers on a reverse solicitation basis. While we welcome the decision to include non-EU-based service providers that would

otherwise qualify as CASPs under MiCA, particularly in order to prevent them from being favoured over their European competitors, we are highly concerned about the inclusion of entities providing services not regulated under MiCA. In our view, the consensus reached under MiCA deliberately aims at not regulating certain services, such as staking and lending, each of them for different reasons. In order to ensure legal certainty and coherence, DAC8 should therefore only cover CASPs that are either already subject to MiCA or would be if established in the EU.

In the context of the scope of DAC8, we would also like to highlight the need to safeguard the potential for innovation in the EU by not imposing too heavy reporting requirements on start-ups, SMEs, and the like. We therefore suggest to introduce a total transaction value exemption whereby the DAC8 obligations would only apply to a limited extent. The thresholds in this respect should be based on the fiat value of the transactions and not necessarily on their number. This is particularly important since the proposal in its current version also covers microtransactions, which as such could lead to a very large volume of data to be reported. In our opinion, this would also be legally justifiable, as the overall relevance under tax law up to certain thresholds is only minor and the effectiveness of the reporting regime is not hindered.

For the reasons noted, we recommend as complete alignment as possible between CARF / MiCA and DAC 8 with regard to RCASPs.

c. *Same Risk, Same Regulatory Outcomes*

As pointed out several times in the context of the negotiations on the EU anti-money laundering ('AML') regulatory framework, there is no evidence to suggest crypto assets are used in illicit activities more than other types of assets (including financial instruments) or fiat. In fact, the technical characteristics of crypto-assets and their underlying technologies sometimes simply bring different and partly new challenges that require an appropriate approach to overcome. Hence, we would like to stress that also when setting rules for tax reporting obligations, it is important to apply the principle of same-risk-same-regulatory outcome.

In this context, we would like to express our reservations about RCASPs obligation of freezing accounts should a user not provide the required information after two reminders following the initial request by the RCASP. Not only does a comparable rule not exist under CARF or even within the regulatory framework of the more traditional financial market, but, in our opinion, it is also, on the one hand, excessive, and on the other hand, technically difficult or even impossible to implement, at least in some areas. We therefore see an urgent need to sound out the factual possibilities in connection with the actual objective of this provision in consultations with the market participants and to discuss a sensible provision on this basis.

d. *Data Security and Data Protection*

We welcome, in principle, the transparency and reporting obligations provided for in the proposal. However, we want to emphasise that in rulemaking for crypto-assets it is important to

be aware of the characteristics of crypto-assets and their underlying as well as supporting technologies (such as blockchains). Amongst others, most blockchains are publicly visible and special emphasis must therefore be placed on taking the nature of this ecosystem into account.

For example, according to the proposal, where a RCASP facilitates payments in crypto assets for or on behalf of a merchant in consideration of goods or services for a value exceeding EUR 50.000, the customer that is the counterparty to the merchant should be treated as its reportable user. In such cases, the RCASP is required to verify the customer's identity in accordance with domestic AML regulations. In this context, we would like to emphasise that this should be done in a way that respects the fundamental right to privacy of reportable users, for example through methods such as zero-knowledge-proofs, which aim to preserve privacy while proving beyond doubt that gathered information is valid. We strongly believe that clear guidance should be provided at the EU level that builds trust and accountability, rather than simply relying on existing processes that do not take into account the characteristics of crypto-assets, blockchain and the increasingly relevant decentralised financial protocols. It would be helpful, also in the context of due diligence procedures, to provide clauses that leave room for the application of new technologies that emerge over time.

Furthermore, we see that as of today, most NCAs in Europe might not be capable of processing large quantities of blockchain data appropriately, let alone exchanging it with one another in a secure, General Data Protection Regulation (‘GDPR’)-compliant manner. Due to the relatively short proposed implementation period of DAC8, we want to particularly highlight the need to create appropriate channels also at the state level that can guarantee the legally required data security and data protection. We stress that it should be avoided as far as possible that sensitive financial data, such as that collected under DAC8, is unintentionally leaked to the public.

e. Tax Identification Number

We agree, in general, that the provision of a Tax Identification Number (‘TIN’) could be essential for Member States to match the information received with the data in their national databases, through facilitating the identification of the taxable persons concerned by the Member States and the correct assessment of the corresponding taxes. For this reason, Article 27c of the proposal contains an amendment that obliges Member States to include the TIN of residents issued by the Member State of residence for taxable periods starting on or after 1 January 2026. Although we consider an EU-wide TIN procedure desirable, we want to highlight that appropriate initiatives still need to be taken, as Member States generally have different systems for issuing TINs.

Specifically, Member States are expected to introduce electronic identification services to simplify and standardise the due diligence process. Such initiatives may require domestic legislative mandates as well as the development, implementation and harmonisation of data and IT systems, and it follows that the time and efforts needed for such initiatives at the Member States’ level should also be incorporated into the overall implementation timeline for DAC8.

f. Penalties for Non-Compliance

The proposal includes a set of minimum penalties for non-compliance. However, considering that almost all RCASPs will have to comply with these requirements for the first time and also given the significant challenges these requirements impose on the RCASPs' operations processes and IT/data security infrastructure, we believe that a phased approach with the introduction of an interim penalty abatement regime would not only be desirable but also sensible. We note that it is not yet clear how and on which basis NCAs will ultimately decide whether the data submitted is incomplete, incorrect or false.

As for the amount of the penalties themselves, we want to highlight that the lower penalty limits of EUR 50 000 and EUR 150 000 for RCASPs with a turnover of less and more than EUR 6 million, respectively, appears to be extremely punitive, especially for small and medium-sized RCASPs, which in many cases are still in their early stages and have limited capacity and resources for such a demanding endeavour. Based on the experience of implementing similarly pervasive and extensive reporting requirements like CRS/DAC2, it is very likely that faults will be committed in the initial stages, before RCASPs fine-tune their processes and capabilities to ensure the required level of compliance.

g. *Implementation Period and Reporting Standards*

Overall, we would like to emphasise that the fundamental principle that must be maintained when establishing an EU-wide framework for tax reporting is legal certainty. While the multitude of international reporting requirements can be quite extensive, which together with the volatility and rapid development of the crypto market can pose significant challenges to the RCASPs concerned, it is nevertheless important to ensure that DAC8 achieves its objective. It is therefore crucial not only to provide adequate reporting standards and formats, but also for RCASPs to be able to implement those in practice. We therefore welcome the Commission's decision to design the DAC8 in such a way that it implements the CARF agreed under the OECD for the EU as uniformly as possible.

In particular, we consider the agreed form of hybrid reporting, whereby RCASPs report annually on an aggregated basis by type of crypto asset and distinguish between outgoing and incoming transactions, while at the same time distinguishing between crypto-to-crypto and crypto-to-fiat transactions, to be suitable for the above purpose in principle. However, especially from a technical point of view, there is still a lack of clear guidance on how the collected data should be appropriately summarised and then transmitted in a readable and secure way. Such guidance will be crucial to ensure a harmonised reporting standard across the EU, especially considering that DAC8 is only a Directive. In this context, we would thus be delighted to further elaborate on the various aspects of the proposal, as appropriate.

Finally, with regard to the implementation period, given the Member States' domestic legislative processes for transposing the rules into national law, and given the many challenges that implementation poses for both authorities and RCASPs, we welcome the Directive's recommended implementation timeline of 2026 for the new provisions to enter into force. Nevertheless, we want to point out that the end of January deadline for reporting the required information under DAC8 is often cumbersome due to the general corporate cycle. From a practical point of view, we therefore suggest following the DAC6 reporting timetable, which runs from May to summer, and adherence to which should generally not only lead to fewer errors and better overall quality of reporting, but also provide considerable relief for those institutions that have to report under both DAC6 and DAC8.

3) Concluding Remarks

This position paper is the result of a series of meetings and discussions with (tax) experts and CASPs, including some of the most relevant exchanges operating in the EU. We have therefore taken the liberty, or consider it appropriate, to call it an 'Industry Position Paper'. In general, we have placed particular emphasis on providing feedback on the DAC8 proposal that is as practical as possible and includes recommendations that would benefit not only CASPs but also NCAs.

The drafting and coordination of this paper was led by Blockpit and the feedback was prepared with input from members of the International Association for Trusted Blockchain Applications (‘INATBA’) as well as Blockchain for Europe. We would therefore like to thank all those who actively participated.

We hope that our concerns and recommendations will be taken into account accordingly and are happy to discuss the various aspects of the feedback in more detail, as appropriate.

Blockpit

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